



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 7542235

Date: FEB. 19, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a human resources specialist under the second-preference, immigrant classification for members of the professions holding advanced degrees. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

After initially granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that the Petitioner did not intend to employ the Beneficiary in the offered position.

Upon *de novo* review, we will withdraw the decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position. *Id.* Labor certification also signifies that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and a requested visa classification. If USCIS grants a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

“[A]t any time” before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for “good and sufficient cause.” Section of 205, 8 U.S.C. § 1155. If

supported by the record, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

USCIS may issue a notice of intent to revoke (NOIR) a petition's approval if the unexplained and un rebutted record would have warranted a petition's denial. *Matter of Esteime*, 19 I&N Dec. 450, 451 (BIA 1987). USCIS properly revokes a petition's approval if a petitioner's NOIR response does not overcome the stated revocation grounds. *Id.* at 451-52.

II. INTENTION TO EMPLOY IN THE OFFERED POSITION

A business may file an immigrant petition if it is "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where, contrary to the accompanying labor certification, a petitioner did not intend to employ a beneficiary as a domestic worker on a full-time, live-in basis). For labor certification purposes, the term "employment" means "[p]ermanent, full-time work." 20 C.F.R. § 656.3.

Here, the petition states the Petitioner's intention to permanently employ the Beneficiary in the full-time position of human resources specialist.¹ The Director approved the petition on October 21, 2016, seven days after its filing. On June 10, 2019, however, the Director issued an NOIR stating:

USCIS has received evidence that after routine checks and site visits that the position of Human Resource[s] Specialist does not exist. The position was available over two years ago but has since been filled and the exact position and job duties of the beneficiary cannot be verified at this time.

An NOIR "must include a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Esteime*, 19 I&N Dec. at 452.

Where a notice of intention to revoke is based on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained, even if the petitioner did not respond to the notice of intention to revoke.

Id.

Contrary to *Esteime*, the Director's NOIR did not state evidence supporting its allegation that the offered position of human resources specialist was unavailable. According to the Director's decision, the Petitioner's president reportedly told a USCIS officer in July 2018 that the company filled the offered position with another worker(s) and that the Beneficiary would instead perform

¹ Although a petitioner must intend to employ a beneficiary in an offered position, the beneficiary need not work for the petitioner in the position until he or she obtains lawful permanent residence. *See, e.g., Matter of Sermerjian*, 11 I&N Dec. 751, 754 (Reg'l Comm'r 1966) (holding that, as of an application for immigrant admission, a foreign national must show a *bona fide* intent to work in a qualifying endeavor immediately or in the foreseeable future).

marketing and administrative duties for the Petitioner. To allow the Petitioner an opportunity to explain or rebut the president's statement, however, the NOIR should have cited that derogatory evidence. Also, the NOIR did not specify when the offered position became unavailable. The NOIR therefore did not establish the petition's erroneous approval. *See Matter of Estime*, 19 I&N Dec. at 451 (requiring an NOIR to demonstrate that the record "would have warranted a denial"). Contrary to precedent case law, the NOIR neither stated sufficient evidence supporting its allegation nor established the filing's denial as warranted. We will therefore withdraw the Director's decision.

III. ABILITY TO PAY THE PROFFERED WAGE

As an additional issue not raised by the Director, the record indicates that the Petitioner did not demonstrate its ability to pay the proffered wage of the offered position. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). If a petitioner employs less than 100 people, as in this case, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

Here, the labor certification states the proffered wage of the offered position of human resources specialist as \$59,696 a year. The petition's priority date is January 12, 2016, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The Petitioner submitted a copy of its federal income tax return for 2015. The record, however, lacks required evidence of the Petitioner's ability to pay in 2016, the year of the petition's priority date. Contrary to 8 C.F.R. § 204.5(g)(2), the Petitioner therefore did not demonstrate its ability to pay the proffered wage "at the time the priority date is established." We will therefore remand the matter.

On remand, the Director should issue a new NOIR informing the Petitioner that it must submit a copy of an annual report, federal tax return, or audited financial statement demonstrating its ability to pay the proffered wage in 2016. The Petitioner may also submit additional evidence of its ability to pay that year, including proof of any wage payments it made to the Beneficiary or documentation supporting other factors that may demonstrate its ability to pay. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

The Director should also review the evidence and argument the Petitioner submitted on appeal. If the Director still finds that the company did not demonstrate its intention to employ the Beneficiary in the offered position, the Director should include this potential revocation ground in the new NOIR. The new NOIR must state evidence supporting the revocation grounds and provide the Petitioner a reasonable opportunity to respond. The new NOIR may also contain any additional revocation ground(s) supported by the record. Upon review of the entire record, the Director should enter a new decision.

IV. CONCLUSION

The NOIR did not state sufficient evidence supporting its allegation or demonstrate the petition's erroneous denial. The Petitioner, however, did not demonstrate its ability to pay the proffered wage of the offered position.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis, which, if adverse, shall be certified to us for review.